United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

605

UNITED STATES COURT OF APPEALS

FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Benjamin F. O'Connor

Appellant

v.

Charles M. Rodgers

No. 22,853
(Habeas Corpus)

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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656-1652; 393-1454

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CERTIFICATE OF SERVICE

I certify that copies of this brief have been served on the United States Attorney for the District of Columbia

JOHN Z. NOYES

Counsel for Appellant

STATEMENT OF ISSUES

The issues presented on this appeal are as follows:

1. The computation of appellant's 20-to-60 months sentence in District Court No. 148-65.
2. The computation of appellant's three-to-ten year sentence in District Court No. 382-66.

This matter has been before the Court of Appeals previously under the same name, but with a different number, that is, Miscellaneous 3383.

References to Rulings:

Judge McGuire denied the petition for habeas corpus by order dated 20 November 1968, without opinion. This order is in the file Misc. No. 3383.

TABLE OF CASES AND STATUTES

Rowe v. Peyton* C.A. Va. 1967, 383 F. 2nds 709

Johnson v. Avery* C.A. Tenn. 1967, 382 F. 2nd 353.

18 United States Code 3500 *

*These cases and this statute are principally relied on by counsel.

* * *

The attention of the Honorable Court is directed to the following papers, which will be relied upon in the brief:

1. Apellant's handwritten petition in the lower court, page two.
2. Judge Gasch's sentencing hearing in No. 362-66, pages seven and eight.

STATEMENT OF JURISDICTION

On November 20, 1967, Judge McGuire of the U.S. District Court denied Benjamin F. O'Connor's petition for a writ of habeas Corpus. On February 14, 1969, in response to an order from the Court of Appeals, Judge McGuire allowed Mr. O'Connor to appeal without prepayment of costs.

The Court of Appeals has jurisdiction to hear this appeal for the following reasons:

1. 28 U.S.Code 2241(a) gives Circuit Judges the power to grant writs of habeas corpus.

2. This appeal is within the general appellant jurisdiction of the Court of Appeals.

3. Benjamin F. O'Connor is presently in the custody of the D.C. Department of Corrections.

4. If the appeal is granted, and the writ issued, appellant will be entitled to consideration for immediate release by the D.C. Board of Parole, but if the writ is not granted, defendant will not be entitled to consideration for parole until January 25, 1971. The fact that the Court's granting of this writ will give the appellant the possibility of immediate release from custody brings the case within the scope of Rowe v. Peyton, C.A. Va. 1967, 383 F. 2nd 709, and Johnson v. Avery, C.A. Tenn. 1967, 382 F.2nd 353, Cert. granted 88 S. Ct. 1071. In both these cases, the Courts of Appeals assumed jurisdiction to hear petitions for habeas corpus, even though the granting of the writs would not mean immediate unconditional release of petitioners.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BENJAMIN F. O'CONNOR)
v.)
CHARLES M. ROGERS)

No. 22,853 (Habeas Corpus)

STATEMENT OF THE CASE

This appeal from the District Court's dismissal of his petition for writ of habeas corpus is being brought by petitioner-appellant, Benjamin F. O'Connor, through his court-appointed counsel, John Z. Noyes. The purpose of this appeal is to test the Department of Corrections' computation of of petitioner's sentences in two criminal cases, Nos. 148-65 and 302-64.

In the U.S. District Court, petitioner-appellant (hereafter referred to by his name, O'Connor) had no counsel for this particular writ, and proceeded with handwritten pleadings. In his pleadings he stated that he had been denied a parole hearing after completion of his 20-to-60 months sentence (District Court No. 148-65). The Government, in its answer to the rule to show cause, assumed that O'Connor's prime interest was in a parole hearing, and its answer to the rule stated that under the statutes he had no right to such a hearing. Judge McGuire, on these pleadings, discharged the rule and dismissed the petition.

However, my interview with Mr. O'Connor at the D.C. Jail convinced me that Mr. O'Connor's actual complaint, which he was unable to set down in writing due to poor education and little knowledge of the law, was that the length of his sentences had not been computed correctly. Accordingly, this appeal brief is based not on the abstract right to a Parole Board hearing, but on one sentence in

Mr. O'Connor's lower-court petition, which said (sic) "In petitioner case he has not recieve time spent in custody for want of bail." (Petition, p. 2)

As will be seen after further perusal of this brief, if Mr. O'Connor is given the sentence credit to which he is entitled, he is presently eligible for parole. This is what he was attempting to say in his handwritten papers filed in District Court.

Mr. O'Connor claims that the Department of Corrections has miscalculated his sentences, thus condemning him to a period of incarceration several years longer than that intended by the Honorable Judge Gasch of the U.S. District Court. At issue is the degree of concurrency between the sentences meted out by Judge Keech in No. 148-65, on July 23, 1965, and Judge Gasch in No. 382-66, on April 25, 1966.

In order to understand this rather tangled fact-situation, we must go back to October 24, 1964, when petitioner-appellant O'Connor was arrested for carrying a dangerous weapon (CDW). This charge eventually grew into U.S. District Court No. 148-65, and resulted in his conviction and an eventual 20-to-60 months sentence.

After his CDW arrest on October 24, 1964, O'Connor posted $ 1,500 bond and was released. However, on January 2, 1965, O'Connor was again arrested, this time for attempted robbery. His bond in the robbery case was set at $ 3,500, and his bond in the CDW case was revoked on January 9th or 10th. He was incarcerated from January 2, 1965, until May 17, 1965, at which time the attempted robbery case was thrown out. On May 17, 1965, bond in the CDW case was re-set at $ 1,500 and O'Connor was released.

O'Connor enjoyed freedom from Mar 17, 1965, to June 25, 1965, at which time he was tried and convicted on the CDW charge before Judge Keech. He was then held without bond until July 29, 1965, when Judge Beach sentenced him to 20-months-to-60-months.

O'Connor then appealed the CDW conviction. Appeal bond was set at $ 2,500, and O'Connor posted the appeal bond on January 10, 1966, and was released. His hard-won freedom was short-lived, however, because on January 21, 1966, he was arrested for attempted robbery, assault, and CDW, stemming from an incident allegedly occurring on January 20, 1966. This charge ultimately became District Court No. 382-66, in which O'Connor was convicted and sentenced to 3-to-10 years.

On January 21, 1966, a $ 3,500 bond was set in the attempted robbery case, which O'Connor could not post, and since that date O'Connor has been continuously incarcerated within the jurisdiction of the D.C. Department of Corrections.

On May 11, 1967, O'Connor was brought to trial in the U.S. District Court before Judge Hart in case No. 382-66. This trial ended in a hung jury (May 17, 1967), and the defendant was remanded to jail.

On March 4, 1968, O'Connor's second trial in No. 382-66 commenced before Judge Gasch. This trial resulted in a verdict of guilty as charged (March 7, 1968). On April 25, 1968, defendant O'Connor was sentenced to three-to-ten years on each count, "said sentence by the counts to run concurrently, and to also run concurrently with sentence now being served; Court recommends Atlanta, Ga.; oral motion of deft. for bond pending appeal heard and denied. Mem. " (Quoted from jacket entry.)

The appeal from this conviction is still pending in the U.S. Court of Appeals (No. 21,995.) The latest action in the appeal is that pursuant to a remand order, Judge Gasch wrote a memorandum giving the reasons for refusing to set an appeal bond (August 24, 1965).

In July, 1965, present counsel visited O'Connor in the D.C. Jail and obtained from him a "statement of sentence," which had been issued by the D.C. Jail and initialed by the Record Clerk. This "statement of sentence" gives the following information:

Parole Elig. Date 1-25-71

Short term exp. 2-14-74

Full term exp. 1-25-78

Remarks: Det #1-62 7-29-77

From this "statement of sentence," which is a document given to all prisoners to inform them of the time they must serve, it is apparent that the Jail authorities compute the degree of "concurrence" in the two sentences differently than Mr. O'Connor does.

ARGUMENT

The appellant makes the following points: 1. His sentence in No. 146-65 has been served. 2. His time in No. 303-66 should be computed from January 21, 1966.

As of the filing of this brief (September 10, 1969), we claim that Mr. O'Connor has served the following time pursuant to his CDC case (No. 140-65):

January 10, 1965-May 17, 1965 = 4 months and 7 days

June 25, 1965-January 10, 1966 = 6 months and 15 days

January 21, 1966-present (September 10, 1969) = 3 years, 7 months and 20 days

This totals to four years and over five months, which, when discounted for "good time," would mean that Mr. O'Connor has already completed the maximum incarceration ordered by the District Court in case No. 140-65. Since the Jail authorities have not informed Mr. O'Connor that he has lost any "good time, " we may safely assume that his sentence in No. 140-65 is completed.

Turning our attention to case No. 382-66 (attempted robbery, etc.), we claim on this petition-appeal that since Judge Gasch ordered that the sentence in No. 382-66 was to run concurrently with the sentence in No. 140-65, this means "fully concurrent, " and consequently Mr. O'Connor has served the following time pursuant to No. 382-66:

January 21, 1966-present (September 10, 1969) = 3 years, 7 months and 20 days.

If this is so, then the various dates given on the "statement of sentence " are in error. Herein follows a comparison of the dates given in the "statement of sentence " and the dates as we claim they should be:

D.C. Jail	no claim
Parole Eli[illegible]. 1-25-71	1-21-69
Short term exp. 2-14-74	to be ascertained
Long term exp. 1-25-76	1-21-76

We respectfully assert that all the time which Mr. O'Connor has served since his initial arrest in the case that became No. 302-66 in District Court should be credited to the sentence imposed by Judge Gasch in No. 302-66. Judge Gasch specifically said that the sentence in 302-66 should be concurrent with the sentence in No. 140-65; and reference is made to the transcript of the sentencing hearing in No. 302-66, pages seven and eight.

Moreover, the Bail Reform Act of 1966 (18 U.S.Code 3568) says as follows: "The sentence of imprisonment of any person convicted of any offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense, or acts for which sentence was imposed. (offense defined)

"If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

"No sentence shall prescribe any other method of computing the term. "

Since Mr. O'Connor was financially unable to post bond in case No. 332-66 from January 21, 1966, until his attempted robbery conviction, we assert that regardless of the status of case No. 148-65 at any particular time subsequent to January 21, 1966, Mr. O'Connor has been in a real sense continuously imprisoned "in connection with " case No. 332-66 from January 21, 1966 to the present time. Accordingly, the Bail Reform Act of 1966 requires that he be given credit for all time served since January 21, 1966.

JURISDICT AND APPEAL
FOR RELIEF

The petitioner-appellant and his counsel respectfully request the following relief:

1. That the Court of Appeals issue an order stating that Mr. O'Connor has served his sentence in case No. 148-65.

2. That the order also state that Mr. O'Connor's sentences in No. 332-66 must include all the time he has been incarcerated since January 21, 1966, and that his parole eligibility, short-term, and Public Law-62 dates be adjusted accordingly.

Respectfully submitted,

JOHN Z. FOXE

Counsel for Benjamin F. O'Connor